

# First Principles.

NATIONAL SECURITY AND CIVIL LIBERTIES

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## In This Issue:

Warrantless National Security Wiretaps, p. 3  
CHRISTINE M. MARWICK

## Coming:

NOV.: Freedom of Information Act  
DEC.: Controlling The Intelligence Agencies

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September 2, 1975 The FBI released documents revealing that Alger Hiss had been under electronic surveillance for two years before he was accused in 1948 of being a Communist. The eavesdropping and physical surveillance produced no indication that Hiss "had knowledge of Whittaker Chambers." The FBI document is the first official corroboration of Hiss' claim that he was the subject of a lengthy wiretap.

September 12, 1975 The House Intelligence Committee released without the approval of the executive branch an assessment by the Intelligence Community of its failure to predict the Middle East war in 1973. The White House had asked for the deletion of the four words "and greater communications security" which it claimed revealed intelligence communications techniques. President Ford attacked the committee action as unprecedented and sent a Justice Department official to retrieve all classified documents previously furnished to the committee and to state his refusal to honor any additional subpoenas. The committee at first reaffirmed its right to release informa-

tion and refused to return the documents. After extensive negotiations, the committee agreed to permit the intelligence community to make deletions in documents provided that they were explained to the committee. The committee also agreed that in the event of a disagreement about what can be made public, President Ford would make the final decision.

September 16-18, 1975 The Senate Select Committee on Intelligence conducted its first public hearings inquiring into the failure of the CIA to destroy shellfish poison and other biological toxins in violation of a Presidential order. The committee hearings determined that no order was sent by the Director of Central Intelligence to his subordinates directing the destruction of biological material and that no report of destruction was sent to senior CIA officials. A middle level official at the CIA decided to retain the toxins because he was not directed to destroy them, believed that were of great value, and was uncertain whether they were covered by the Presidential order.

September 23, 1975 In its second round of public hearings, the Senate Intelligence Committee focused on the Huston plan, confirming that the illegal activities authorized by the plan — burglaries and mail opening — were already being conducted before the plan was written and continued after Nixon withdrew his approval of the plan. It was also revealed that the FBI had conducted more than 238 burglaries between 1952 and 1966 in the investigation of 14 "domestic security targets" and "numerous" others between 1952-1966 focused on three other groups. The Committee also reported that the CIA "watch list" for mail opening included the names of John Steinbeck, Linus Pauling, and Victor Reuther. The CIA also maintained a folder of mail marked "Selected American Politicians," which included letters to and from Richard Nixon, Edward Kennedy, Frank Church, Bella Abzug, and Arthur Burns. The Nixon letter was one containing political advice sent to Nixon from Moscow by Raymond Price.

## In The News

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*It is at all times necessary, and more particularly so during the progress of a revolution and until right ideas confirm themselves by habit, that we frequently refresh our patriotism by reference to first principles.*

THOMAS PAINE

## In The Courts

(Note: We will attempt in this section to provide a comprehensive report on important developments in all cases involving a clash between claims of national security and civil liberties. We would appreciate being advised of pending cases and of being informed of new developments. The Project would also be grateful for copies of orders, decisions and other relevant papers.)

June 25, 1975 *U.S. v. Burrow*, 396 F. Supp. 890 (D.Md. 1975)  
The warrantless search of a civilian-owned van parked on an open military base is not a violation of the Fourth Amendment if there was probable cause and exigent circumstances related to the base commander's responsibility for maintaining security, order, and discipline.

September 2, 1975 *Committee for G.I. Rights v. Callaway*, No. 74-1285. (D.C. Cir.) Reversing the decision of the District Court, the appellate court held that warrantless searches of soldiers as part of a drug abuse program was constitutional in the military context because of "the vital interest of the nation in maintaining readiness and fitness of the armed forces."

September 10, 1975 *U.S. v. Calley*, 519 F.2d 184 (5th Cir. 1975). Civil courts will review military court martial on a habeas corpus petition only if the asserted error is of substantial constitutional dimension. Moreover, "Where a serviceman's assertion of constitutional rights has been determined by military tribunals, and they have concluded that the serviceman's position, if accepted, would have a foreseeable adverse

effect on the military mission, federal courts should not substitute their judgment for that of the military courts."

September 26, 1975 *Halperin v. Kissinger*, Civ. Action No. 1187-73, D.D.C. Judge John Lewis Smith ruled that the plaintiffs were entitled to take the deposition of Richard Nixon in a civil suit seeking damages against Nixon and others for a warrantless "national security" wiretap. The court expressed doubt as to whether an ex-President can invoke executive privilege, but ruled that in any case plaintiffs had established a need strong enough to overcome the privilege.

## In The Congress

September 10, 1975 The Kastenmeier Subcommittee on Courts, Civil Liberties, and the Administration of Justice agreed to begin mark-up of the Mosher Bill of Rights and Procedures Act of 1975, H.R. 214 (corresponding to Sen. Mathias' S. 1888) during the first week of November.

September 29, 1975 The Senate Subcommittee on Intergovernmental Relations heard testimony from New York University Law Professor Norman Dorsen on developments in the case law bearing on the doctrine of executive privilege. Dorsen, who is general counsel of the ACLU spoke in support of legislation be-

fore the Subcommittee which would provide for Congressional challenges in the courts of executive decisions to withhold information from the Congress. Hearings on Executive Privilege will continue in October.

## In The Literature

**Magazines**  
"Unclonking the CIA," by Charles J. V. Murphy, *Fortune*, June 1975, p. 98. Murphy contends that no intelligence agency can be effective unless its operations are secret. The article provides a good discussion of the intelligence community's view of the dangers of investigating their activities.

"Listening In With the CIA," by George Clifford, *Argosy*, September 1975, p. 34. Describes the CIA programs of monitoring soviet submarines.

"Government Snooping — How to Fight Back," *U.S. News and World Report*, September 22, 1975. A concise question and answer presentation on how the Privacy Act of 1974 affects individual rights, information, and government agencies.

"Project Chile: How the CIA helped Build the Most Brutal Dictatorship This Side of the Iron Curtain," by Tad Szulc, *Penthouse Magazine*, October 1975, p. 52. How the CIA, starting in 1964, sought control of Chilean politics and the result: bloodbath, imprisonment, torture, and continuing economic chaos.

### Law Reviews

"Executive Privileges: What Are the Limits?" by Timothy V. Ramis, 54 *Oregon Law Review* 81 (1975). Discusses the meaning and legal issues of executive privilege and suggests a number of distinctions between executive communications privileges and misconduct.

### Books

*The Abuses of the Intelligence Agencies*, edited by Jerry J. Berman and Morton H. Halperin (Center for National Security Studies, Washington: 1975) \$2.75. (See order blank on page 15.) A factual presentation of all currently available information about the abuses of the intelligence agencies.

# Warrantless National Security Wiretaps

BY CHRISTINE M. MARWICK

*President: . . . Lake and Halperin. They're both bad. But the taps were too. They never helped us. Just gobs and gobs of materials: gossip and bullshitting (unintelligible).*

*Dean: Um huh.*

*President: The tapping was a very, very unproductive thing. I've always known that. At least, I've never, it's never been useful in any operation I've ever conducted.*

—Nixon Tapes, February 28, 1973

## Warrantless Wiretapping and the Fourth Amendment

Any discussion of warrantless wiretapping in the United States in recent years sooner or later reaches a central contradiction. In private, a President will say that wiretapping has "never been useful," while in public warrantless wiretapping is staunchly defended as absolutely vital to the security of the United States — so vital that the relevance of the Fourth Amendment fades before it and the President has inherent powers to determine when to suspend the Bill of Rights.

The contradiction has taken different forms in each administration, but there have been consistent links from one to the next. The most important thread is the secrecy which covers the existence of warrantless wiretaps. Without judicial warrants or congressional oversight, it has been impossible to tell who has been tapped, what has been found out, what use has been made of the information, or whether it was in any sense worth the encroachments on constitutional rights.

The first constitutional right threatened by warrantless wiretaps is that of the Fourth Amendment:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Founding Fathers drew on their own experience as political dissidents in a British colony, denied the rights of Englishmen. The Fourth Amendment was a direct reaction against the "general warrants" which had allowed agents of the crown to search anywhere and seize anything. The Bill of Rights was designed to ensure that citizens had a right to be protected from unwarranted governmental intrusions into their privacy, as well as a right to lawfully question and challenge government policy without the threat of harassment for holding controversial opinions.

The Fourth Amendment held that the only allowable intrusions into the privacy of the home had to be both reasonable and limited to the

**"Yes, Mr. And Mrs. America —  
This Is Your Life"**



minimum necessary to carry out the legitimate public function. Warrants were part of a system of checks and balances to ensure that searches and seizures were not to be based on the whims of individual officials, but subject to the scrutiny of an impartial magistrate. Warrants were to be issued only upon a showing of probable cause to believe that a crime had been or was about to be committed.

The Supreme Court has held, of course, that "the Constitution is not a suicide pact." In times of crisis the needs of the nation must be met, but the Court would limit such actions far more stringently than the executive would practice them. The Court's criteria has been that there must be a compelling state interest (national security genuinely at stake) which can be dealt with effectively in no other way; the infringement of rights must be drawn as narrowly as possible so that executive branch actions do not expand into a broad incursion into other protected rights; and the state interest must be so clearly compelling that both the executive and Congress have agreed and acted together.

Warrantless wiretaps simply do not fit these criteria. The warrant requirement of the Fourth Amendment does not interfere with the national security; but warrantless tapping does, as the section later on the abuses discusses, expand into other protected rights, such as their chilling effect on free speech and violation of attorney-client confidentiality. Wiretaps are, by definition, carried on without the knowledge of the subjects and a balancing is therefore essential. While many outside the executive have argued that the judiciary is historically overinclined to give the executive the benefit of the doubt in granting warrants, nevertheless the fact that the taps must be approved and recorded by a court provides safeguards for constitutional rights. The terms of a warrant can include rigorous procedures to ensure that a tap does not broaden into a general warrant, is not used for irrelevant purposes, not initiated for personal grievances, and is limited as strictly as possible to only the investigation of the suspected criminal activity rather than the personal affairs and vulnerabilities of the subjects of the tap.

While it is true that a court is not a research organization and therefore weighs heavily the executive's assertions, the revelations of the past decade have done a great deal to throw the cold light of day on both the expertise and the credibility of executive branch officials. When the executive has asserted that courts lack the expertise

in foreign affairs even to consider the validity of whether a given tap is in fact a "national security" tap, the courts have not been receptive, as Justice Powell's discussion in the *Keith* case shows. Indeed, it is less than clear that the Attorney General is more of a foreign affairs expert than federal judges. Attorneys General make their decisions authorizing wiretaps on the basis of memoranda very like those an agency would submit to a judge in order to get a warrant.

The executive has argued that the Fourth Amendment must be suspended in the case of wiretaps because a warrant requirement would deny the right to wiretap in many "vital" situations. Yet it seems impossible to think of a situation that would threaten the national security and yet *not* involve an imminent criminal violation of espionage or sabotage laws, i.e., probable cause for issuance of a warrant. The executive also has argued that the Fourth Amendment must be suspended because it would take too long to get a warrant in emergencies. Yet this also seems disingenuous. In the time that it takes to install a tap, it seems improbable that officials would not be able to rouse a judge who was interested enough in the national security to issue a warrant. And national security warrant procedures could permit a brief period of "emergency" warrantless surveillances as is now permitted in the investigation of crimes. In spite of the fact that the executive has been unable to cite an instance of a judicial "leak" of sensitive information, they have also argued that trusting the discretion of the courts is too dangerous to the national security.

The part of the argument which the executive branch fails to mention is that if warranted wiretaps are convenient (even if not extremely valuable) because the subject cannot know that they are going on until after the fact, then warrantless wiretaps are doubly convenient because there is literally no accountability for them, and it is this payoff between legitimate and illegitimate means that is especially threatening.

Having sketched very briefly here some of the salient Fourth Amendment issues, we turn first to a history of wiretap law and practice, and then to the uses and abuses of secrecy in wiretapping — a secrecy not only from the subjects of the tap, but from the legal process itself. Then we will turn to a listing and summary of wiretap and Fourth Amendment cases and of civil suits now in the courts for damages from wiretapping. And lastly, we conclude with a brief summary of bills pending before Congress to regulate wiretapping.

## The Legal History

Wiretapping is a technological innovation unforeseen by the Founding Fathers. Because of this, it has had a complex legal history revolving around such issues as where it falls within the constitutional schema and whether it is a search and seizure within the meaning of the Fourth Amendment, what are the limits of the wiretapping authority provided by Congress, and what should be the rules for admitting wiretap information into evidence. Of late attention has focussed on whether there is a national security exception to the Fourth Amendment warrant requirement for wiretaps.

In the case of *Olmstead v. U.S.*, 277 U.S. 438 (1928), the Supreme Court voted 5-4 that a wiretap which did not actually involve a physical trespass to install in a person's home was not a search and seizure; the protection of the Fourth Amendment was held to cover places rather than people's expectations of safety and privacy. Mr. Justice Brandeis' dissent is worth quoting:

... as a means of espionage writes of assistance and general warrants are but puny instruments of tyranny and oppression when compared to wiretapping.

While the Supreme Court, by a slim majority, had decided that wiretapping was not a constitutional issue, the Congress in the Federal Communications Act of 1934 (47 U.S.C. §605) placed statutory sanctions against the practice:

... no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect or meaning of such intercepted communication to any person. . . .

The Justice Department claimed, however, that the Act had not meant to define federal agents engaged in the detection of a crime as "persons" restricted by the Act. While the Supreme Court had been unwilling to view wiretapping as a Fourth Amendment issue, it decided in *Nardone v. U.S.*, 302 U.S. 379 (1937) that Section 605 was intended to "include within its sweep federal officers as well as others." Therefore, evidence from the wiretap was inadmissible in court.

The Justice Department returned with a case based not on direct evidence from the tap, but with evidence from leads from the tap. In *Nardone v. U.S.*, 308 U.S. 388 (1939) the Court decided that such evidence was tainted — "the fruit of the poisonous tree" — and also inadmissible.

The following year, with World War II in its beginning stages, the first signs of a national security exception appeared. President Roosevelt sent Attorney General Jackson the following memo on wiretapping policy:

*The White House, Washington  
Confidential — May 21, 1940*

### MEMORANDUM FOR THE ATTORNEY GENERAL

I have agreed with the broad purpose of the Supreme Court decision relating to wire-tapping in investigations. The Court is undoubtedly sound both in regard to the use of evidence secured over tapped wires in the prosecution of citizens in criminal cases; and is also right in its opinion that under ordinary and normal circumstances wire-tapping by Government agents should not be carried on for the excellent reason that it is almost bound to lead to abuse of civil rights.

However, I am convinced that the Supreme Court never intended any dictum in the particular case which it decided to apply to grave matters involving the defense of the nation.

It is, of course, well known that certain other nations have been engaged in the organization of propaganda of so-called "fifth columns" in other countries and in preparation for sabotage, as well as in actual sabotage.

It is too late to do anything about it after sabotage, assassinations and "fifth column" activities are completed.

You are, therefore, authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigation agents that they are at liberty to secure information by listening devices direct[ed] to the conversation

or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies. You are requested furthermore to limit these investigations so conducted to a minimum and to limit them insofar as possible to aliens.

/s/ F.D.R.

This led to Attorney General Jackson's interpretation of Section 605 that it restricted only a combined interception-and-divulgence. Mere interception, in spite of the chain of people within the executive who knew the contents of the tap, was not prohibited by the Act. While evidence from a tap was inadmissible because it required divulging a communication, tapping for the purpose of gathering intelligence rather than evidence, according to the Justice Department, was not prohibited. This led to a self-contradictory position on wiretapping. While they would sometimes admit to having tapped the defendants in a criminal prosecution, the Justice Department would consistently contend that the taps had provided no evidence used in the trial. Yet they failed to explain why, if the taps were so consistently useless, the practice was continued.

In the Truman administration, the wiretapping policy was broadened to include not only taps for national security but also for domestic security and crimes which endangered human life (such as kidnapping). Attorney General Tom Clark sent to Truman for countersigning a policy letter which quoted the earlier Roosevelt memorandum but which omitted mentioning FDR's position that wiretap investigations were to be limited "insofar as possible to aliens" — an apparent deception about what the Roosevelt policy had been.

*Office of the Attorney General  
Washington, D.C.  
July 17, 1946*

The President, The White House.

My dear Mr. President:

Under date of May 21, 1940, President Franklin D. Roosevelt, in a memorandum addressed to Attorney General Jackson, stated:

"You are therefore authorized and directed in such cases as you may approve, after investigation of the need in each case, to authorize the necessary investigating agents

that they are at liberty to secure information by listening devices directed to the conversation or other communications of persons suspected of subversive activities against the Government of the United States, including suspected spies."

This directive was followed by Attorneys General Jackson and Biddle, and is being followed currently in this Department. I consider it appropriate, however, to bring the subject to your attention at this time.

It seems to me that in the present troubled period in international affairs, accompanied as it is by an increase in subversive activity here at home, it is as necessary as it was in 1940 to take the investigative measures referred to in President Roosevelt's memorandum. At the same time, the country is threatened by a very substantial increase in crime. While I am reluctant to suggest any use whatever of these special investigative measures in domestic cases, it seems to me imperative to use them in cases vitally affecting the domestic security, or where human life is in jeopardy.

As so modified, I believe the outstanding directive should be continued in force. If you concur in this policy, I should appreciate it if you would so indicate at the foot of this letter.

In my opinion, the measures proposed are within the authority of law, and I have in the files of the Department materials indicating to me that my two most recent predecessors as Attorney General would concur in this view.

Respectfully yours,  
/s/ TOM C. CLARK  
Attorney General  
July 17, 1947 [sic]

I concur.

/s/ HARRY S. TRUMAN

Until 1965, the White House policy then, was that tapping for intelligence purposes for national security, for internal security, and for crimes endangering human life was permissible, although the evidence gained from such taps was not admissible in court. In reality, this meant that tapping was often not admitted to. (See the discussion on *U.S. v. Ciofalo* below.) Shrouded by secrecy and national security claims, it was easy to deny that any tap had been done.

The Johnson administration changed some of this. President Johnson's memorandum on the subject of wiretapping policy returned to the national security distinction and restricted wiretaps to

national security taps done with the approval of the Attorney General:

*Administratively Confidential*  
*The White House*  
 Washington — June 30, 1965  
 Memorandum for the Heads of  
 Executive Departments and Agencies

I am strongly opposed to the interception of telephone conversations as a general investigative technique. I recognize that mechanical and electronic devices may sometimes be essential in protecting our national security. Nevertheless, it is clear that indiscriminate use of these investigative devices to overhear telephone conversations, without the knowledge or consent of any of the persons involved, could result in serious abuses and invasions of privacy. In my view, the invasion of privacy of communications is a highly offensive practice which should be engaged in only where the national security is at stake. To avoid any misunderstanding on this subject in the Federal Government, I am establishing the following basic guidelines to be followed by all government agencies:

(1) No federal personnel is to intercept telephone conversations within the United States by any mechanical or electronic device, without the consent of one of the parties involved (except in connection with investigations related to the national security).

(2) No interception shall be undertaken or continued without first obtaining the approval of the Attorney General.

(3) All federal agencies shall immediately conform their practices and procedures to the provisions of this order.

Utilization of mechanical or electronic devices to overhear non-telephone conversations is an even more difficult problem, which raises substantial and unresolved questions of Constitutional interpretation. I desire that each agency conducting such investigations consult with the Attorney General to ascertain whether the agency's practices are fully in accord with the law and with a decent regard for the rights of others.

Every agency head shall submit to the Attorney General within 30 days a complete inventory of all mechanical and electronic equipment and devices used for or capable of intercepting telephone conversations. In addition,

such reports shall contain a list of any interceptions currently authorized and the reasons for them.

/s/ LYNDON B. JOHNSON

Attorney General Ramsey Clark ordered that the Justice Department policy be to admit in prosecutions when defendants had been wiretapped.

The next major development in wiretap law came in 1967 when the Supreme Court reversed the earlier *Olmstead* decision and held that wiretaps and other electronic surveillance methods were a search and seizure and that evidence from them would not be admissible in court unless Fourth Amendment requirements, including the warrant, were met. In *Berger v. New York*, 388 U.S. 41 (1967) the Court listed the shortcomings of a New York wiretapping law — that it did not meet the Fourth Amendment standards for probable cause, for limiting the surveillance to what would correspond to a single search, for specifying the kind of conversation to be intercepted, or for providing for court review of what material actually had been seized.

In *Katz v. U.S.*, 389 U.S. 347 (1967) the Court held that "the Fourth Amendment protects people, not places" — therefore even conversations from a public phone booth were protected. Again, Fourth Amendment standards had to be met for evidence to be admissible in court. There were, however, some compromises made in reaching the majority opinion. It was held that warrants for wiretaps were not general warrants because it was possible to specify what conversations were to be overheard or avoided and to limit the duration of the tap. The court held that *Katz* was not a retroactive decision. And more importantly, the court for the first time suggested that the Fourth Amendment might be applied differently in national security cases:

Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case. (*Katz v. U.S.*, 389 U.S. 347, 358 (1967).)

Following the decisions in *Berger* and *Katz*, Congress incorporated a detailed chapter on "Wire Interception and Interception of Oral Communications" into the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C. §§2510-2520). Following the Fourth Amendment standards for warrants set out in *Berger* and *Katz*, the bill was designed primarily to allow wiretapping against organized crime. The Act stated that if the



President had the right to tap without a warrant in certain specified situations, the Act would not take this power away:

§2511(3) Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial, hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

From this, the Nixon administration claimed authority to dispense with warrants and probable cause in all wiretaps relating to national security, foreign affairs, and domestic security. These were defined so broadly that even domestic political dissidents who were engaged only in lawful political activity were included. Presidential authority expanded from FDR's wiretapping to protect the nation from "sabotage, assassination, and 'fifth column' activities" to a need to get "preventive" intelligence. Presidential discretion, in other words, was claimed to be immune from the Fourth Amendment.

These claims were rejected by the Supreme Court in *U.S. v. U.S. District Court*, 403 U.S. 297 (1972), more commonly known as the *Keith* decision. The administration had claimed that the Omnibus Crime Control Act's provision that it did not intend to "limit the constitutional power of the President to take such measures as he deems necessary to protect the nation," was meant to authorize warrantless taps against anyone the President felt were security threats. The Court held however that the statute had not intended to delegate any extra powers to the President. It was intended only to state its neutrality — that it would not interfere with the President's con-

stitutional powers. The Court held that the President's constitutional powers are controlled by constitutional limitations in the Bill of Rights.

The Justice Department has claimed that the President's "inherent powers" and position as the organ of foreign policy meant that he must have complete discretion in deciding what was a reasonable surveillance — the President, in other words, could suspend the Fourth Amendment by invoking national security. It was claimed that the expertise needed to judge whether a warrant was reasonable fell beyond judicial competence. It is worth quoting Mr. Justice Powell's opinion:

We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. . . . If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.

The opinion made a number of other points, among them the fact that, contrary to the opinion of the executive, warrants are not an obstruction. Quite the reverse, they make challenges in court easier to refute.

The *Keith* decision effectively ended administration efforts to stretch its warrantless wiretap powers to include purely domestic security surveillances. The Court continued to reserve judgment on the rights of foreign agents, while it defined such agents as being those with a significant connection to a foreign country, such as financial support or first allegiance.

The case of *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975), has placed additional restrictions on the expansive Nixon administration definition of national security wiretap authority. The government contended that because subjects of the wiretap were engaged in activities which were highly embarrassing and therefore threatening to the United States' foreign policy (bombing Soviet embassies), they were subject on national security grounds to warrantless wiretaps. The court held otherwise:

A warrant must be obtained before a wiretap is installed on a domestic organization that is neither the agent of nor acting in collaboration with a foreign power, even if surveillance is installed under presidential directive in the name of foreign intelligence gathering for protection of the national security.

A directive from President Ford and Attorney General Levy has ordered that this decision take effect as government policy nationwide, and not merely within the D.C. Circuit.

## The Uses and Abuses of Warrantless Wiretapping

Warrantless wiretapping is by definition shrouded in secrecy and falls beyond the protections of the checks and balances inherent in a separation of powers. As with other kinds of secrecy in the name of national security, citizens are told they must give up some of their constitutional rights in order to protect their liberty.

But beyond such pleas to put faith in rhetorical paradoxes, there are other realities. It is very convenient for officials when they fall beyond the pale of judicial, congressional, and public scrutiny. What little is known about the true extent of wiretapping in this country has either leaked out or been dragged out of the executive branch in discovery motions in litigation. In his annual appearances before the House Appropriations Committee, Hoover's guiding principle was to be totally misleading about the scope of FBI surveillances without committing perjury. Every year, the total he gave was around 100 wiretaps. However, to reach this figure required some juggling of the books. Since bugs didn't require Attorney General approval, they weren't counted. The wiretap tally would be brought down by discontinuing taps and installing bugs instead. In the alternative, he would have taps discontinued a day or so before his testimony, and resumed shortly after, while carefully phrasing his count as the number of taps "at this time." In his deposition in the *Halperin v. Kissinger* wiretap suit, Horace Hampton, the C&P Telephone Co. executive who was in charge of FBI requests for national security taps for 22 years, said that there were generally 100 taps in Washington, D.C. alone, at any given time. One critical feature of a system of warrantless wiretaps is that without judicial oversight there are no provisions for finding out how many taps there have been, who has been tapped and for what actual purposes, or who has been overheard.

One goal of the agencies which carry on wiretaps has been to be sufficiently unaccountable that they are able to issue a "plausible denial" in order to prosecute successfully. In the case of *U.S. v. Coplon*, 185 F.2d 629 (1950), the government used evidence from an illegal tap but attributed it to a "confidential informant of known reliability." When their plausible denial broke down and it was revealed that Coplon had in fact been tapped, Judge Learned Hand held that Section 605 of the Federal Communications Act applied even to wiretaps installed for national security and authorized by the Attorney General.

It is not in the interests of executive agencies to keep diligent records of their taps. The FBI, for example, is supposed to maintain their ELSUR (Electronic Surveillance) Index in order to be able to inform a court whether a given defendant has been overheard so that it can be determined

whether the case is based on tainted evidence. But the fact that taps are reviewable in court after the fact and in the event of a prosecution is a scant comfort. The ELSUR Index, given a policy of using it as a basis for making plausible denials, is not a convincing safeguard. It does not constitute a serious effort to catalogue retrievable information. By FBI admission, only the names of callers who are positively identified are entered into the index. The large majority of those overheard, which includes even good guesses as to the identity of the caller, are not entered. Furthermore, the ELSUR Index involves no cross referencing system. The defendant can only find out if his or her name appears, not whether there was a tap on a phone that they were suspicious of — there are no cross references to place. Records of taps on a given phone are kept only by the name of the person who subscribed to the phone, and not the other people who regularly used it or even lived in the same place.

The 17 wiretaps of White House aides and newsmen provides another view of the machinations devised in order to maintain a plausible denial. Records of the taps were never incorporated into the ELSUR index of people who had been overheard. The White House found itself in an extremely awkward position during the Ellsberg trial when it realized that Ellsberg had been overheard on the tap on the home phone of Morton H. Halperin. Because of the decision in *Alderman v. U.S.*, 394 U.S. 165 (1969) holding that records of illegal taps had to be turned over to the defense to examine, and the White House had ample reason for covering up. In order to maintain a plausible denial, the records were scurried from the office of Assistant FBI director Sullivan to the safe of John D. Ehrlichman. It was only a leak from an FBI source to *Time* magazine and a subsequent investigation by acting FBI director William Ruckelshaus which broke the story of the taps.

There is of course an alternative explanation of why the records migrated which also sheds light on warrantless wiretapping. That explanation was that the White House was afraid that Hoover would use the taps as blackmail leverage if there were an effort to retire him. This brings us to the assertion that since American officials are honorable men, their discretion in wiretapping can be trusted. The explanation of Maj. Gen. Harry H. Vaughn, a military aide to Truman, as to why Hoover had carte blanche White House support is an interesting contrast:

All of the higher-up bureaucrats and politicians were sure that Hoover was tapping them. They were afraid to make an issue of it.

—New York Times, July 19, 1973

Apparently using the national security rationale for wiretaps was as elastic as officials wanted it to be. Hoover, irate because of Martin Luther King's criticism of FBI handling of civil rights violations, initiated an extensive "national security" tap on the pretext that King had two friends who were "suspected communists." The taps did not contain information related to the national security, but they did contain interesting material about Dr. King's sex life, which Hoover gave to conservative legislators, the media, and even to King's wife.

The warrantless national security taps also have allowed a cover for domestic political espionage. The Nixon White House was interested in the Lake and Halperin phone taps, because of the information it offered about the presidential campaign of Sen. Edmund Muskie; likewise, Lyndon Johnson, his 1965 directive to the contrary, used taps to collect data on his political competition, including Robert Kennedy.

While it is clear that the temptations for abuse have sometimes been more than honorable men could resist, the safeguards which are offered are unconvincing. It is obvious that wiretapping in an inherently unselective search and seizure. Many private, personal, embarrassing things totally unrelated to the national security are picked up just as clearly as plans to commit crimes. Yet there is no convincing safeguard for dealing with such compromising material totally unrelated to the purported reason for the tap.

Likewise, it is a spurious assurance to say that citizens can rely on the Attorney General to screen these taps. The Attorney General has no staff equipped to balance the conflicting claims of national security and constitutional rights, and agencies requesting taps do not see taking such values into account as part of their function.

Finally, once again, the executive would have us fall back upon a belief that honorable men are in offices such as that of the Attorney General. In a post-Watergate era, such assurances have a hollow ring. It would seem far more reliable to return to first principles and a rule of law rather than of men — the Fourth Amendment provides for checks and balances with judicial warrants rather than the unbridled whims of bureaucrats.

Extracting from the President's constitutional powers an inherent power in national security situations that is exempt from judicial review, introduces an unnecessary ambiguity into the Fourth Amendment protections. At present, agents of a foreign power apparently can be wiretapped without a warrant — the Supreme Court reserved judgment on that issue in *Keith*, which presented a strictly domestic surveillance operation, and then denied certiorari in *Butenko*. Yet the situation is ill-defined. A press agent doing public relations work for a foreign government is a legitimate agent of a foreign power with a significant monetary connection. Does this mean that to accept a foreign government as a client and register with the State Department would be to accept executive discretion to wiretap?

The executive claims the right to wiretap embassies and embassy officials without a warrant. There are however a number of awkward questions attached to such a situation. First, a blanket approval of such taps seems clearly to be in violation of the 1961 Vienna Convention on Diplomatic Relations, which was ratified by the U.S. Senate in 1972. Second, there are serious problems in drawing the lines as to whom it is permissible to tap. Is it permissible to tap a diplomat's home phone? The phone of his or her friends? And if someone who is a friend of a diplomat is interesting to potential tappers for other reasons, is there any reason to believe that, without Fourth Amendment protections, this would not expand into a system of abuses?

While it sounds fairly harmless at first blush to allow the tapping of diplomats — who don't need Fourth Amendment protection because they have diplomatic immunity and expect to be tapped anyway — this ignores the fact that diplomats are carrying on conversations with other people who will be talking about political and personal topics. Without a warrant requirement there is no way to assure that the legal and Fourth Amendment rights of others have any protection.

Finally, while executive spokesmen will insist that such taps are "vital" (they have a record of insisting that a wide range of things are absolutely vital but which turn out not to be), it does not take a great deal of sophistication to question this. Given that diplomats assume that their phones are tapped, it is clear that if they do venture "useful" information over the phone, it may well be a plant. No information obtained over such taps, without confirmation from other more reliable sources of information, can be taken at face value. While there have been a great many assertions that all this is vital to the national security, apparently no study actually assessing the usefulness of wiretapping has been done. And indeed, the system contains no incentive for assessing the value of taps when they are a "free good" — something provided out of another agency's budget, regardless of whether or not it is worth the costs. This brings us back to the words of Richard Nixon — wiretapping is "very, very unproductive."

But to say that wiretapping is unproductive — whether in court or for intelligence — is not to say that it is without effect, namely the deprivation of protected privacy and the "chilling effect" on free speech. An encroachment on Fourth Amendment freedoms spreads over into others. We close with another quote from Mr. Justice Powell's majority opinion in *Keith*:

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of Government action in private conversation. For private dissent, no less than open public discourse, is essential to our free society.

## Wiretap and Fourth Amendment Decisions

*Olmstead v. U.S.*, 277 U.S. 438 (1928). Held that absent a physical trespass into a home or office, wiretapping was not a search and seizure and therefore not subject to Fourth Amendment warrant requirements.

*Nardone v. U.S.*, 302 U.S. 379 (1937). Held that evidence obtained from wiretapping was inadmissible under Section 605 of the Federal Communications Act of 1934.

*Nardone v. U.S.*, 308 U.S. 388 (1939). Held that the "fruit of the poisonous tree" — evidence derived from wiretap leads — was also inadmissible in court.

*U.S. v. Coplon*, 185 F.2d 950, cert. denied, 342 U.S. 920. Held that evidence from wiretaps, even when installed for national security purposes and authorized by the Attorney General, was inadmissible in court under Section 605.

*Abel v. U.S.*, 362 U.S. 217 (1960). Held that the government must comply with Fourth Amendment requirements even with an agent of a foreign government illegally in the U.S.

*Berger v. New York*, 388 U.S. 41 (1967). Held that a New York wiretapping statute was subject to the requirements of Fourth Amendment standards and laid out standards of specificity and minimization.

*Katz v. U.S.*, 389 U.S. 347 (1967). With *Berger*, held that electronic surveillance was a search and seizure under the Fourth Amendment, which "protects people, not places." The Court reserved judgment on whether the Fourth Amendment requirements could in national security cases be satisfied without a warrant.

*Alderman v. U.S.*, 394 U.S. 165 (1969). Held that in illegal wiretaps defendant has a right to examine the records for indications of tainted evidence being introduced in court.

*U.S. v. Clay*, 430 F.2d 165 (5th Cir. 1970); *rev'd* on other grounds, 403 U.S. 698 (1971). Held that a national security wiretap authorized by the Attorney General legal and based on the trial judge's *in camera* examination of the logs and determination that they contained no evidence used against defendant in trial, the defense could not examine the logs.

*U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (also known as the *Keith* case). Held that the President could not authorize warrantless wiretaps of individuals or groups who did not have a significant connection with a foreign power. *U.S. v. Brown*, 484 F.2d 418 (5th Cir. 1973). Held that warrantless national security wiretaps aimed at gathering foreign intelligence were legal and logs need not be turned over to defense; court noted *in camera* inspection did not reveal information related to the prosecution.

*U.S. v. Butenko*, 494 F.2d 593 (3rd Cir. 1974), cert. denied sub nom. *Ivanov v. U.S.*, 419 U.S. 881 (1974). Warrantless national security wiretaps aimed at gathering foreign intelligence legal; and evidence of the crime was incidental; logs need not be turned over to the defense.

*U.S. v. Ehrlichman*, 376 F. Supp. 29 (D.D.C. 1974). Held that the President cannot suspend the Fourth Amendment in burglary case on national security grounds.

*Giordano v. U.S.*, 394 U.S. 310 (1974). Held that Congress had not intended in the Omnibus Crime Control Act (Title III, 18 U.S.C. §2516(1)) that the power to authorize wiretap applications be exercised by anyone other than the Attorney General or the Assistant Attorney General he specially designated.

*Zweibon v. Mitchell*, 516 F.2d 594 (1975). A lawsuit for damages for warrantless wiretapping. Held that even where foreign affairs issues are involved, the President must obtain a warrant when the domestic organization under surveillance is not an agent or collaborator of a foreign power.

## Lawsuits for Damages in Warrantless Wiretapping

(ACLU cases are marked with an asterisk)

As mentioned in the preceding article, there are a number of lawsuits pending for damages as a result of illegal national security wiretapping. Under the provisions of the Omnibus Crime Control and Safe Streets Act, anyone tapped in violation of the Act is entitled to sue for civil damages at a rate of \$100 per day for each day of illegal interception.

\**Berlin Democratic Club v. Schlesinger*, Civ. No. 310-74, D.D.C. Wiretapping of American civilians in Germany working for the McGovern presidential campaign and civilian lawyers working with the Lawyers Military Defense Committee. Army forced to admit that facts were "misrepresented" in denying plaintiff's allegations. Discovery motions and government summary judgment motion pending.

*Dellinger v. Mitchell*, Civ. No. 1768, D.D.C. Suit by several defendants in the Chicago Seven conspiracy trial and other politically dissident groups who were overheard on domestic and foreign wiretaps. Extensive discovery granted in domestic taps and authorization given to notify those subject to surveillance.

*Jabara v. Kelley*, Civ. No. 39065, E.D. Michigan. Action for damages brought by Arab-American lawyer against FBI for wiretapping; substantial discovery ordered.

\**Halperin v. Kissinger*, Civ. 1187-73, D.D.C. Wiretapping of former NSC deputy to Henry Kissinger for 21 months. Extensive discovery granted.

\**Kenyatta v. Gray*, 71 Civ. 2595, E.D. Pa. Class action, based on surveillance of lawful political activity revealed in Media FBI documents, for declaratory and injunctive relief against FBI.

*Kinoy v. Mitchell*, 70 Civ. 5698, S.D.N.Y. Damages for wiretapping of civil rights attorney. The court denied government motion for summary judgment based on an inherent powers exemption, non-retroactivity of *Keith*.

\**Lake v. Ehrlichman*, 74 Civ. 887, D.D.C. Suit for damages by one of 17 White House aides and newsmen tapped. Discovery of wiretap logs granted.

*McAlister v. Kleindienst*, Civ. No. 72-1977, E.D. Pa. All discovery stayed pending disposition of government's motion for summary judgment on grounds of non-retroactivity of *Keith*, non-applicability of 18 U.S.S. 2570, official immunity and good faith.

*Sinclair v. Kleindienst*, Civ. No. 610-73, D.D.C. Dismissed on motion for summary judgment based on assertion of good faith.

## Wiretapping Legislation Pending Before House and Senate Committees

*S. 84 Surveillance Practices and Procedures Act*. Introduced by Senators Nelson and Kennedy. Provisions: a court order would be required for all national security electronic surveillance; American citizens could be wiretapped only if there were probable cause; national security electronic surveillances could not be authorized unless they met strict criteria relating to military security of national defense; surveillance could only be performed by the FBI; the President could authorize an emergency tap but would have to apply for a court order within 48 hours; the Attorney General would have to report regularly to the Senate and House Judiciary and Foreign Relations Committees and would be directed to devise regulations to safeguard privacy; the government would be required to inform individuals that they had been overheard. (Identical to H.R. 142)

*S. 1888 Bill of Rights Procedures Act of 1975*. Introduced by Sen. Mathias. Includes not only wiretapping but other forms of surveillance, including third party records (bank, credit, medical records, etc.) The federal government would require a warrant based on probable cause. The bill includes provisions requiring time limits for reporting information about the taps to the Administrative Office of the U.S. Courts and the Committees on the Judiciary of the Senate and House, in order to assure that the safeguards of the Bill of Rights are adhered to. The act provides a penalty of up to \$10,000 and/or a year imprisonment for government officials who willfully violate the provisions of the bill. (H.R. 214 is identical to S.1888.)

Senate

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## Pending Legislation (continued)

### House

H.R. 141 *The Surveillance Practices and Procedures Act of 1975*. Introduced by Rep. Kastenmeier. Would change the provisions of §2511(3) of the Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C., to allow national security wiretaps of foreign agents with a judicial warrant, but under a standard less stringent than probable cause — that the agent is serving a foreign country to undermine the United States.

H.R. 142 Introduced by Rep. Kastenmeier. See S.84.

H.R. 171 Introduced by Rep. Abzug. Makes wiretapping and electronic surveillance conducted with the consent of one party to the conversation illegal, unless pursuant to a court order. (Same effect as H.R. 620).

H.R. 214 Bill of Rights Procedures Act of 1975, introduced by Rep. Mosher. See S. 1888.

H.R. 620 Introduced by Rep. Clarence Long. Would incorporate into the Omnibus Crime Act provisions making one party-consent wiretapping illegal except with a court order; would put such taps on the same basis as non-consensual taps. H.R. 1603 Introduced by Rep. Drinan. Would make all wiretapping and electronic surveillance illegal, prohibiting even court-ordered wiretaps; criminal provisions of up to 5 years and/or a \$10,000 fine for violation.

H.R. 1864 *Freedom from Surveillance Act*, introduced by Rep. Kastenmeier. Prohibits any investigation, or surveillance regarding beliefs, associations, political activities or private affairs of citizens unless there is probable cause for belief that a crime has been or is about to be committed or the subject is an applicant for federal employment.

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for controlling investigative techniques are in the Fourth Amendment as the Supreme Court has interpreted it: where there is a reasonable expectation of privacy, the government may not intrude except with a warrant based on probable cause to believe that a crime has been or will be committed. This should apply to wiretaps, bugs, burglaries, financial records, and informers. The FBI should be the only organization authorized to conduct such surveillance within private organizations and its operations should require a warrant requested by the Attorney General and based on the Fourth Amendment standards of probable cause. Security clearance investigations — which should be conducted only when authorized by the applicant — and IRS records should be isolated from other information, restricting their use to their primary functions.

The fourth step in controlling intelligence agencies is to create a set of penalties to increase the probability that the intelligence organizations will stay within their charters and the limits on their investigative techniques. It should be made a crime for any official of an intelligence organization to knowingly violate and/or to order or request an action which would violate the congressional limitations or public regulations controlling the activities of the agencies. Failing to report such violations should also have criminal sanctions. (This provision admittedly raises some civil liberties issues, but on balance it seems to me to be reasonable.) The policing of the crimes of the intelligence community should be in the hands of a single official, whether a special prosecutor or a

specially designated Assistant Attorney General. He or she should have access to all intelligence community files and should be empowered to release of any information necessary to prosecute a criminal offense.

The tendency of intelligence agency officials to skillfully deceive, usually without actually committing perjury, suggests the need for an additional criminal statute prohibiting intelligence officials or senior policy makers to willfully deceive Congress or the public about agency activities and possible violations of its charter and restrictions.

Civil remedies patterned after those now available for illegal wiretaps should back up these criminal penalties by allowing anyone whose rights have been violated by the intelligence organizations to sue. Such penalties should be set out in a statute and there should be no need to prove actual damage; nor should there be any "good faith" defense except the good faith belief that the rules had been complied with.

The fifth and final step is congressional oversight. A committee should be created in each house for authorizing all intelligence budgets and monitoring all activities which might infringe civil liberties. If the other steps proposed here are in place, vigorous committees can make a difference. But there is a danger that some may see oversight alone as a sufficient solution; it is not.

Much that I have sketched here is controversial, but it should serve as an agenda for what must be considered to control the intelligence agencies. In my view, these proposals are as close to the minimum necessary to prevent a new round of abuses when the nation turns to other matters.

## Point Of View (continued)

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# Controlling the Intelligence Agencies

MORTON H. HALPERIN

The violations of constitutional rights by the intelligence community — long since revealed and now being augmented by the hearings of the Senate Intelligence Committee — should leave no doubt of the need for fundamental change. Some abuses resulted from presidential orders, such as the CIA's investigation of the anti-war movement; others, such as the CIA mail opening and COINTELPRO, were carefully concealed from the White House. It is not enough to place faith in having good Presidents and honorable men in the intelligence agencies. We need to create a legislated structure of safeguards which clearly delineates the functions of the intelligence community while holding them to the laws of the land and the Constitution.

The first step in creating such a structure should be to decide that the basic facts about each agency — its existence, its charter, and its budget — must be made public. For example, the National Reconnaissance Office, which runs the spy satellites, is an agency whose existence is still officially denied; the charter of the NSA is contained in a still-secret 1952 Presidential Directive; and the budgets of most intelligence agencies remain secret. Such secrecy is not part of any legitimate national security purpose, but it does short circuit congressional control and public debate.

The second step that should be taken is to determine what activities each intelligence agency should be permitted to undertake. The basic char-

ters should be fixed by legislation and the details spelled out in public agency regulations which Congress can oversee and veto. The details of determining the limits of each agency's role will be a complex matter to work out, but the essential structure for legislation is clear. The CIA should be limited to collating and evaluating intelligence information, and its only activities in the United States should be openly acknowledged actions in support of this mission. The agency's clandestine service should be abolished. The FBI should be limited to the investigation of crime; it should be prohibited from conducting "intelligence" investigations on groups or individuals not suspected of crimes. The IRS should collect taxes and return to being color blind about the politics of citizens. NSA should monitor international communications in a way that avoids recording of the communications of Americans. The Military should have no role in the surveillance of American citizens. A new and separate agency, without a function of investigation crimes, should conduct security clearance investigations.

The third step in correcting the abuses of the intelligence community is to place limits on the investigative techniques which may be used by the federal agencies. Again, the restrictions should be in the form of legislated charters, with agencies issuing public implementing directives that are subject to congressional veto. The simplest principles

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*Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.*

JAMES MADISON TO THOMAS JEFFERSON,  
MAY 13, 1798